



United States  
**CONSUMER PRODUCT SAFETY COMMISSION**  
Bethesda, Maryland 20814

**MEMORANDUM**

**DATE:** June 27, 2006

**TO :** GC

**Through:** Todd A. Stevenson, Secretary, OS 

**FROM :** Martha A. Kosh, OS

**SUBJECT:** Substantial Product Hazard Reports; Proposed Revision  
to Interpretative Rule, 71 FR No. 30350, May 26, 2006

ATTACHED ARE COMMENTS ON THE CC 06-1

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
CC 06-1-1	5/28/06	Crispin Pierce Becky Pierce	<u>crispinpierce@charter.net</u>
CC 06-1-2	6/13/06	Catherine Downs	4400 East-West Hwy, #606 Bethesda, MD 20814
CC 06-1-3	6/23/06	Wayne Morris Vice President Division Services	Association of Home Appliance Manufacturers 1111 19 <sup>th</sup> St, NW Ste 402 Washington, DC 20036
CC 06-1-4	6/26/06	Steve DeHaan Executive Vice President	National Home Furnishings Assoc. 3910 Tinsley Dr. Suite 101 High Point, NC 27265
CC 06-1-5	6/26/06	Lee Bishop Sr. Counsel Product Safety & Regulatory Compliance	GE Consumer & Industrial Appliance Park AP2-225 Louisville, KY 40225

Substantial Product Hazard Reports; Proposed Revision to  
Interpretative Rule, 71 FR 30350, May 26, 2006

CC 06-1-6	6/26/06	David Asselin Exec. Director	National Association of Manufacturers CPSC Coalition 1331 Pennsylvania Ave. NW, Suite 600 Washington, DC 20004
CC 06-1-7	6/26/06	James Burns President	National Association of State Fire Marshals 1319 F St, NW, Ste 301 Washington, DC 20004
CC 06-1-8	6/26/06	Deborah Fanning Exec. Vice President	The Art and Creative Materials Instit. Inc. 1280 Main St, 2 <sup>nd</sup> Fl P.O. Box 479 Hanson, MA 02341
CC 06-1-9	6/26/06	Michael Wiegard Counsel for Kawasaki Motors Corp, USA Joint Comments Of America Honda Motor Co., Inc., Kawasaki, Polaris Industries Inc. & Yahamah Motor Corporation, USA	Eckert Seamans Cherin & Mellott, LLC 1747 Pennsylvania Ave, NW, Suite 1200 Washington, DC 20006
CC 06-1-10	6/26/06	Frederick Locker Counsel for Toy Industry Association	Locker Greenberg & Brainin, PC 420 Fifth Ave. New York, NY 10018
CC 06-1-11	6/26/06	Kathy Van Kleeck Sr. Vice President, Government Relations	Motorcycle Industry Council 1235 South Clark St Suite 600 Arlington, VA 22202
CC 06-1-12	6/26/06	Brigid Klein Deputy General Counsel	Consumer Specialty Products Assoc. 1913 Eye St, NW Washington, DC 20006
CC 06-1-13	6/26/06	Ken Suggs President	Association of Trial Lawyers of America 500 Taylor St. Columbia, SC 29202

Substantial Product Hazard Reports; Proposed Revision to  
Interpretative Rule, 71 FR 30350, May 26, 2006

CC 06-1-14	6/26/06	Janell Duncan Sr. Counsel for Legal and Regulatory	Consumers Union 1666 Connecticut Ave. NW, Suite 310 Washington, DC 20009
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Donald Mays  
Sr Director, Product  
Safety & Consumer  
Sciences, Consumer  
Union

Rachel Weintraub  
Director of Product  
Safety and Senior Counsel  
Consumer Federal of  
America

Nancy Cowles  
Executive Director  
Kids in Danger

Edmund Mierzwinski  
U.S. Public Interest  
Research Group  
Consumer Program  
Director

CC 06-1-15	7/-7/06	Richard Seib Director Global Product Safety	Whirlpool Corp. 2000 N. M-63 Benton Harbor, MI 49022
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Stevenson, Todd A.

*Subst  
Product  
Hazard* 1

From: crispinpierce@charter.net  
Sent: Sunday, May 28, 2006 10:11 PM  
To: Stevenson, Todd A.  
Subject: Opposition to redefining product safety

Dear Consumer Product Safety Commission,

With this letter, we would like to express our opposition to the more broad and poorly defined definition of "safety" being considered for consumer products. The current definition has long served us as the American public in identifying dangerous products. The proposed change would complicate this definition.

While adequate warnings and the number of a particular product still in use are valid considerations, they can easily be interpreted subjectively, and obscure the process of identifying dangerous products and protecting the public.

Please discard the proposed dilutions of the safety definitions and maintain the long tradition of protecting the public that CPSC has earned.

Sincerely,  
Crispin and Becky Pierce  
Eau Claire, WI

***Catherine E. Downs  
4400 East West Highway #606  
Bethesda, MD 20814***

June 13, 2006

Secretary  
U. S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Subj: Substantial Product Hazard Reports

Dear Mr. Secretary:

I read with some dismay the Commission's recent publication of proposed revisions to its interpretative rules regarding reporting of possible substantial product hazards. As a former long-time employee of CPSC and a former presider over the preliminary determination panel for the Office of Compliance, I find these proposed revisions not only unnecessary but potentially dangerous for consumers and users of consumer products.

One needs to look no further than the CPSC's own website to negate the argument that "the risk of injury from a product may decline over time as the number of products being used by consumers decreases." The website proclaims:

**"CPSC's Most Wanted:**

- **Window Blinds**
- **Lane Cedar Chests**
- **Old Cribs**
- **Cadet Heaters"**

All of these products are older technology or design and yet they are extremely hazardous to users regardless of their age.

Let me address the specific factors that are proposed for consideration:

1. **The obviousness of such risk:** To whom is this risk suppose to be obvious? CPSC has long proclaimed that it is the advocate for the “most vulnerable populations.” In our society that is the very young and the very old. Perhaps a potential risk might be very obvious to someone 35 years old with keen eyesight and agile fingers but far less obvious to someone 88 with dimmed eyesight and arthritic fingers. Each person at CPSC who is considering this factor must also consider whether he/she is among the aging baby boomers or is his/her parent at that stage and do we want to put those people more at risk? Who would determine what is obvious? This seems to muddy the waters only more.
2. **The adequacy of warnings and instructions to mitigate such risk:** I spent untold hours working with manufacturers trying to design and redesign warning labels and instructions so that risk could be avoided and the user would be aware of how to use the product safely. In the end, CPSC’s long-time advice to manufacturers held true, “design the risk out of the product.” Many manufacturers are in foreign countries and those designing labels and instructions do not use English as their first language. The warnings and instructions are often barely understandable for assembling a product let alone making it clear that the product may present a risk of injury.
3. and 4. **The role of consumer misuse of the product and the foreseeability of such misuse:** I was with CPSC when we had reports of consumers using lawn mowers for hedge trimmer. I have seen the most unbelievable misuse of products that resulted in horrid injuries. Yet, I cannot say that misuse is not foreseeable and a conscientious manufacturer will consider misuse in the design of the product. The Commission employs a wonderful human factor’s staff who advise compliance on use and possible misuse of a product. This advice is considered before making a hazard determination. It was the foresight of the early staffing specialists that made the talents of these people available to compliance staff for decision making.

These factors are weak at best and do not provide additional guidance to a manufacturer as to when to report a defective product. At best they can only weaken the protection that is offered to the consumer. The commission must never forget that their number one responsibility is to the consumer. I fear that there are many in management positions at CPSC have lost their contact with the consuming public who they are intended to serve.

I do support the section on encouraging manufacturers to comply with voluntary standards. A voluntary standard does not in and of itself eliminate the possibility of a defect but it is a good basis to start with when designing a product. Many times during preliminary determination panel meetings, the participants were faced with a product that met the voluntary standard, but we had to concede that the standard had not anticipated or

allowed for the possibility of the current defect. We, therefore, brought forth a finding of a substantial product hazard and the appropriate staff went off to work with the standard setting organizations to “fix” the standard. This same logic applies to mandatory standards. Look at the many revisions and updates to the crib standard or the bicycle standard. New technology often out paces an existing standard. Relying on compliance with a voluntary or mandatory standard does not exempt a product from having a defect.

I would caution the Commission from going forward with these revisions. I do not think that they benefit the consumer nor the work of the public safety organization created to protect them.

Respectfully submitted,

Catherine E. Downs  
Formerly Deputy Director for Recalls (Section 15)  
Office of Compliance, CPSC  
Currently, National Team Leader  
Fatality Analysis Reporting System  
National Highway Traffic Safety Administration

**Stevenson, Todd A.**

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**From:** Catherine.Downs@dot.gov  
**Sent:** Tuesday, June 13, 2006 2:49 PM  
**To:** Stevenson, Todd A.  
**Subject:** Substantial Product Hazard Reports  
**Sensitivity:** Private  
**Attachments:** Comments on Proposed Revision CPSC.doc

Please see comments attached.

Catherine E. Downs  
FARS Team Leader  
NHTSA/NCSA  
202-366-4257

6/13/2006

**June 23, 2006**

**Comments of the Association of Home Appliance Manufacturers  
Regarding  
Substantial Product Hazards Reports and Proposed Revision to Interpretative Rule**

**I. INTRODUCTION --**

AHAM welcomes the opportunity to comment on the proposed revisions to the Interpretative Rule relating to substantial product hazards under Section 15(b) of the Consumer Product Safety Act.

AHAM represents manufacturers of major, portable and floor care appliances and their suppliers. All of our members are subject to CPSC jurisdiction. CPSC represents the appliance industry's most important regulatory relationship, just as safety is our most important responsibility. Our goal is to maintain and improve product safety and consumer protection while minimizing regulatory burdens and providing clarity and transparency for the regulated community. Safety is a fundamental legal and moral obligation of firms which place products in the marketplace and the CPSC's mission is of the highest order.

Because of the appliance industry's commitment to safety and to the efficacy of the Commission, we engage in a number of activities with the Commission and safety organizations, such as UL and CSA, to ensure continuing improvements in the safety of products and of our consumers. For example, AHAM has been involved with Commission efforts to ensure that importers of consumer products, particularly in China, are fully aware of their legal obligations under U.S. law and are utilizing safety analysis in their design and manufacturing activities as well as undertaking continuous monitoring and evaluation of product failures.

For a number of years, and through several administrations, AHAM and others in the regulated community have urged the Commission to provide greater clarity and transparency in the key areas in which it operates. With regard to this notice, AHAM applauds the Commission for stepping up to the plate and providing additional descriptions of considerations that both the Commission and industry should consider in evaluating obligations under Section 15. After thirty years, it is appropriate for the Commission to revise its guidance taking into account its experience in compliance.

AHAM's objective in supporting revisions to the existing guidance is neither to impact the volume of reports submitted nor to change the number of reports which result in a corrective action. Rather, AHAM's goal is for all of regulated industry, as well as other interested parties, to have as complete an understanding as possible of the criteria and the procedures which apply in Section 15(b) considerations. The thousands of consumer product manufacturers and retailers

who participate in the United States market should not have to hire lawyers who specialize in CPSC matters in order to understand what is relevant in determining whether a report is required, whether a product is defective and whether there is substantial product hazard.

The answers to these questions are not clear and obvious from the statutory text. Section 15(b) contains very general language requiring parties who obtain information which “reasonably supports the conclusion” that their product contains a defect which could create a substantial product hazard or creates an unreasonable risk of serious injury or death to immediately inform the Commission of such defect or risk unless there is adequate knowledge that the Commission has been informed. The questions of whether there is a defect, unreasonable risk, product hazard or whether there is a reasonable basis for such conclusion requires consideration of a number of factors. It is simply not the law that when any question arises regarding the safety of a product the company is obligated to file a report with the Commission.

Certainly companies may voluntarily file information regarding a possible product safety issue with the Commission at any time for any reason. Indeed, the Commission has adopted a pilot program in which major retailers file unverified data based on raw consumer allegations which simply use certain safety-related terms. The submission of this information to the Commission without any analysis by the submitter is creating a significant data flow to the Commission of information. The Commission recognizes that the vast majority of this information does not meet the reporting obligations of Section 15(b).

But, there is no legal obligation for companies to file reports with the Commission unless they are obligated to do so by the CPSA. It is good regulatory policy for the government to explain to affected parties when they are obligated to take certain action. That is the very purpose of the existing rule. If the CPSA required that a notice must be filed whenever there was a suggestion that a safety hazard may be present there would be no need for the interpretative rule at all. For thirty years the Commission has recognized that the Section 15 hurdle is much higher – reports are only required whenever there is “information which reasonable supports the conclusion” that a product could “create a substantial product hazard,” or “create an unreasonable risk...” In making these decisions, the guidelines have recognized that companies should take into account multiple factors. But the present guidance is simplistic, limited and does not take into account the Commission’s experience in dealing with complex products, mass production, and globalization.

The present guidelines are perceived by many in the regulated industry to be applied inconsistently and unfairly. Examples in the current guidelines of non-defective and non-reportable products like sharp knives do not provide useful guidance for the assessment of risks presented by far more sophisticated and complex products. As we have noted, the guidelines lead to inconsistent results because they are so broad and vague that similar fact patterns can elicit different responses from compliance officers whether a report must be filed, corrective action taken or whether late filing penalties are appropriate. The guidelines are perceived as unfair because reasonable decisions can be second-guessed with the benefit of hindsight.

AHAM seeks a reporting, corrective action and penalties regime which is predictable, fair and effective. A predictable regulatory system would allow companies to understand when they should react and understand what will be the reaction of the Commission. A fair system means that the emphasis would be on real safety issues and not 20/20 hindsight of what might have been done. We need a system which encourages responsible internal review that focuses on "substantial hazards," even if the eventual result of that review might turn out to be incorrect in light of subsequent events. Most importantly, an effective regulatory system motivates early monitoring and action from design to production to consumer use.

Based on these principles, we support the addition of relevant factors to the Section 15 guidelines. We commend the Commission for making a modest but useful step in that direction. Some of these factors perhaps should be clarified in the final revision. But, nonetheless, the factors stated in the notice are all relevant and useful. None of them inherently weigh against submission of information or a determination that a product is not defective or contains a substantial product hazard. In fact, each of these considerations "cuts both ways" in that their absence or presence may weigh for or against disclosure and may or may not indicate the need for corrective action. They are simply relevant considerations. They are not safe harbors or exemptions. Their existence does not mean that other factors, including the dangerousness of the hazard or exposure of children, are not relevant or are less significant.

Most of the considerations proposed are already a staple of the existing law of product liability, as recognized in the Restatement Third, Torts: Product Liability and in European Union Guidelines.

## II. CLARIFICATION OF THE COMMISSION'S DEFINITION OF DEFECT UNDER SECTION 1115.4 --

This revision adds to the existing list of considerations the obviousness of risk; the adequacy of warnings and instructions that mitigate such risks; the role of consumer misuse of the product; and the foreseeability of such risk. These are additional considerations which, in fact, are considered by staff consistent with generally applicable product liability principles; therefore, in the interest of transparency and providing guidance to the regulated community, these considerations ought to be explicitly stated in the Commission's guidelines.

The obviousness of the risk is a reasonable, albeit not exclusive, consideration in whether a product is defective. If, for example, a sensitive population, such as children, are involved or a product is very dangerous then even a patently obvious risk can still result in an obligation to report and even recall a defective product. The addition of this factor also makes it clear that non-obvious or subtle risks must be considered and may weigh toward a determination of a substantial product hazard.

Equally relevant are the adequacy of warnings and instructions to mitigate risks. In both common law and in CPSC practice, the significance of certain hazards are evaluated along with the adequacy of warnings and instructions. The lack of adequate warnings and instructions indicates a stronger need for a submission to the Commission and possible corrective action. A

company obviously cannot “paper over” a defect through warnings and instructions. However, there are many properly designed products that inherently present a degree of risk to the consumer. If reasonable, simple instructions can mitigate the risk -- and ignoring instruction and warnings exacerbate the risk -- then it is appropriate to consider the warnings and instructions in an analysis of the product.

The role and foreseeability of consumer misuse is often considered in compliance decisions. It is reasonable and cognizable under the law for manufacturers and the Commission to consider to what extent hazards are created by unforeseeable and unreasonable consumer use. For example, consumers who place flammable materials in clothes dryers are creating an extremely dangerous situation, and this behavior is specifically prohibited by the product instructions. But the fact that it is possible for a serious accident to occur under those circumstances does not mean that the products are defective. Consumers who know or should have known better can be expected to appropriately use and handle a product and not to act in a reckless or a negligent manner.

On the other hand, manufacturers recognize that not all consumers will always comply with instructions or act appropriately and consequently margins of safety are built into both safety standards and products. Therefore, manufacturers should anticipate and mitigate through product design certain reasonably foreseeable consumer misuses. This is another example of how the recognition of this factor does not mean that there will be fewer or greater reports; it simply legitimates and memorializes a well-recognized consideration.

### **III. NUMBER OF DEFECTIVE PRODUCTS DISTRIBUTED IN COMMERCE --**

The Commission proposes clarifying that in evaluating the substantial risk of injury involving a particular consumer product it recognizes that the aggregate risk of injury from products declines over time as the number of products used by consumers decreases. This does not mean that a hazardous product is immune from action by the CPSC simply because there are fewer of them in use. Current CPSC guidance recognizes that the number of products in commerce is relevant to a finding of “substantial product hazard” for low or moderate hazards. See, e.g., 16 CFR §§1115.4(e), 1115.12(g)(1)(ii). The proposed language simply acknowledges that the assessment of “substantiality” should be based on the number of products in use when the risk is perceived. If a product exhibits an end-of-life failure mode that is particularly hazardous, it is completely appropriate for the Commission to take action – whether that action is a conventional recall or an outreach campaign by a group of manufacturers for owners of obsolete and dangerous products.

Similarly, AHAM urges the Commission to recognize that product age is also relevant in the evaluation of the particular failure mode presenting a hazard. Potentially unsafe product failures caused by obvious or commonly accepted product wear out modes may be less risky, and may be less of a “substantial” product hazard, than similar failures caused by poor design or manufacturing techniques. For example, while it may be appropriate to report to the CPSC if the electrical cord on a new product shorts and could cause a fire due to improper construction or

design, the same failure on the cord of a portable appliance due to repeated flexing that is well-past the useful life of the appliance or the cord probably does not constitute either a “defect” or a “substantial product hazard”.

#### **IV. COMPLIANCE WITH PRODUCT SAFETY STANDARDS --**

The Commission is well advised to explain the relationship of safety standards and Section 15. Clearly, a product’s failure to meet any applicable mandatory standards may be the basis for corrective action and compliance with such standards is relevant to Section 15 determinations.

Most relevant to AHAM products and components promulgated are the so-called “voluntary” standards: in the case of household appliances, electrical products standards developed primarily by Underwriters Laboratories and gas products by an ANSI accredited committee. It is critical to recognize that these standards are not voluntary in any meaningful sense. Reputable manufacturers and retailers will not make and sell products which do not comply with applicable standards. The Commission staff has always taken the view, which manufacturers accept, that a failure to comply with a voluntary safety-related standard is a significant factor in a determination that a product is defective or at least requires a submission of information to the Commission.

Similarly, compliance with a standard, if that standard is applicable to the risk or failure under consideration, also is relevant as to whether there is a reasonable basis that a product is defective. It is not a safe harbor or exception to the rule; it is possible that a product could comply with a standard and still need to be reported to the Commission. However, the Commission is correct in its endorsement of the voluntary standard process as an effective means to the production of safe products, and it is clearly appropriate to consider compliance with those standards in any product hazard evaluation. We recommend that this language be clarified, however, to make clear its intent that the standard must speak to the hazard and risk under consideration to be relevant to any Section 15 consideration.

V. FUTURE COMMISSION ACTION --

Just as AHAM commends the Commission for its proposal, we urge it to provide additional guidance to the regulated community in the future. We suggest that the Commission adopt a more formal and transparent internal administrative appeal of preliminary hazard determinations as well as final hazards determinations. Present procedures do not describe a specific path by which the initial decision by the compliance division can be challenged if the manufacturer continues to disagree with the compliance staff. Instead, we have a system in which industry veterans and lawyers understand the workings of the Commission but many small businesses, for example, do not understand their rights and obligations. The Commission should have a reasonable, transparent process for reaching enforcement decisions that reflect the views of the Commissioners and staff.

We also believe that the Commission should adopt a policy that describes the considerations in imposing penalties for untimely reporting and the amount of the penalty. This would eliminate arbitrariness, provide predictability and facilitate and incentivize voluntary, self reporting. Section 20 contains criteria for the Commission to consider in determining the amount of penalties but there is no guidance as to what these terms mean or whether there are any additional considerations.

There is even less statutory guidance and no interpretative guidance on the conduct that warrants a penalty in the first place. CPSA Section 20 states that penalties may be imposed for, among other things, any knowing violation of Section 19. Section 19 includes, among its prohibited acts, a failure to furnish information required by Section 15(b). This chain of analysis requires then a consideration of whether, in the case of failure to file or late filing under Section 15(b), a firm knowingly failed to file it in a timely manner. Whether a company knowingly acted in this way then depends on consideration of the knowledge and the information available to it and its actions.

For example, just as the Commission endorses compliance with voluntary standards by its favorable view towards products which comply with those standards, it should encourage internal corporate self-policing through the operation of detailed and rigorous evaluations of products returned from the field, and formal procedures to evaluate new products. Those companies that undertake these procedures in good faith should not thereby be presumed to have had knowledge of a defect and be subject to penalties. Rather, such internal evaluations ought to be encouraged even if in hindsight it is determined that a submission should have been made. Other agencies, such as EPA and OSHA, have adopted such policies with the result that companies have invested in elaborate worker safety and environmental compliance organizations and audits. These organizations and procedures are much more effective in protecting workers and the environment than sporadic and arbitrary government enforcement.

**June 23, 2006 Comments of the Association of Home Appliance Manufacturers  
Regarding Substantial Product Hazards Reports and Proposed Revision to Interpretative Rule**

**Page 7**

**VI. CONCLUSION --**

Government and industry work best when the rules are clear, expectations are high but reasonable, and positive conduct is rewarded. We commend the Commission for this initiative and urge that it be finalized as soon as possible.

We would be glad to provide any further information as requested.



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Association of Home Appliance Manufacturers  
1111 19th Street, N.W.; Suite 402  
Washington, D.C. 20036  
[wmorris@aham.org](mailto:wmorris@aham.org)  
Phone 202-872-5955

Counsel: Charles A. Samuels  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC  
701 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
202-434-7311  
[casamuels@mintz.com](mailto:casamuels@mintz.com)

**Stevenson, Todd A.**

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**From:** Morris, Wayne [WMorris@AHAM.org]  
**Sent:** Friday, June 23, 2006 4:56 PM  
**To:** Stevenson, Todd A.  
**Cc:** Samuels, Chuck; Mullan, John G.  
**Subject:** Comments on FRN 16CFR1115  
**Attachments:** 06\_0623AHAMSec15Comments.pdf

Mr. Stevenson,

Enclosed are the comments of the Association of Home Appliance Manufacturers on the Federal Register Notice, Volume 71, Number 102, May 26, 2006.

If you have an opportunity, would you confirm that these have been received?

Thank you for your assistance.

*Wayne Morris*

Vice President, Division Services  
Association of Home Appliance Manufacturers  
1111 19th St. NW Suite 402  
Washington, DC 20036  
Tel: 202-872-5955 x 313  
Fax: 202-872-9354  
email: wmorris@aham.org

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6/26/2006

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Set 15  
4

**Stevenson, Todd A.**

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**From:** Stevenson, Todd A.  
**Sent:** Tuesday, June 27, 2006 11:15 AM  
**To:** Stevenson, Todd A.  
**Subject:** FW: [Possibly SPAM (header): ] - Substantial Product Hazard Reports - Email has different SMTP TO: and MIME TO: fields in the email addresses

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**From:** Steve DeHaan [mailto:sdehaan@nhfa.org]  
**Sent:** Monday, June 26, 2006 9:51 AM  
**To:** cpssc-os@cpssc.gov.  
**Subject:** [Possibly SPAM (header): ] - Substantial Product Hazard Reports - Email has different SMTP TO: and MIME TO: fields in the email addresses

National Home Furnishings Association  
3910 Tinsley Drive  
Suite 101  
High Point, NC 27265

June 23, 2006

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway,  
Bethesda, MD 20814

RE: Substantial Product Hazard Reports

Dear Commissioners:

On behalf of the National Home Furnishings Association (NHFA) I wish to comment on the proposed revisions to your interpretative rules regarding reporting of possible substantial product hazards. NHFA represents thousands of home furnishing retailers throughout the United States.

First, we do commend the agency for attempting to update these rules. It is our understanding that the rules have not been updated since 1978.

From our reading of the proposed changes, our first reaction is that the proposed rules do not provide the clarity and certainty that you had hoped to achieve. Our belief is that when "average" retailers read these rules, and attempt to assess their obligations under the rules, they will continue to be frustrated. At the end of the process, retailers will still not understand how these factors are considered by the Commission. As a result, retailers are faced with two choices—either to not report or to overcompensate and report everything. Neither outcome is a desirable one.

We believe the desirable outcome is clear, certain, and fair rules that foster a cooperative compliance environment. More dialogue and discussion about these proposed rules would be our recommendation.

6/27/2006

Finally, we urge you to work with the Office of Advocacy for Small Business within the Small Business Administration. Chief Counsel Thomas Sullivan and his staff have a tremendous wealth of experience in helping agencies produce rules that are clear, certain, and fair.

We thank you for the opportunity to comment on the proposed rule changes.

Sincerely,

/Steve Dehaan/

Steve DeHaan  
Executive Vice President

6/27/2006



## GE Consumer & Industrial

Lee L. Bishop

Senior Counsel – Product Safety & Regulatory  
Compliance

Appliance Park, AP2-225  
Louisville, KY 40225  
USA

T 502 452 4078  
F 502 452 0395  
lee.bishop@ge.com

June 26, 2006

Todd A. Stevenson  
Director  
Office of the Secretary  
US Consumer Product Safety Commission  
Washington, D.C. 20207

VIA EMAIL AND US MAIL

**RE: Comments of General Electric Company Regarding Substantial Product Hazards  
Reports and Proposed Revision to Interpretative Rules**

Dear Mr. Stevenson:

GE Consumer & Industrial (C&I) welcomes the proposed revisions to the interpretative rule regarding substantial product hazards under Section 15(b) of the Consumer Product Safety Act. GE adopts the comments filed by the Association of Home Appliance Manufacturers ("AHAM"), its trade association.

GE C&I is a leading full-line manufacturer and marketer of major household appliances, (including clothes washers and dryers, dishwashers, kitchen ranges and ovens (gas and electric), refrigerators/freezers and room air conditioners, and microwave ovens), and lighting products and fixtures. GE C&I has its headquarters at Appliance Park, Louisville, Kentucky.

Due to the nature of its products, GE C&I has filed reports under Sec. 15(b) and participated in product recalls. It has also developed and implemented an extensive product safety procedure to prevent safety-related failures in its products, and to analyze and react properly if such failures occur. In the course of evaluating new designs and existing product performance, GE C&I has consulted and relied upon the existing Interpretive Rule.

As stated in the comments of AHAM, the explanations of "defect" and "substantial product hazard" in the existing interpretive rule are so vague that they are of little assistance in determining if a particular matter is reportable under Sec. 15(b). The additional factors in the proposed revision are often relevant to hazard analyses performed by manufacturers and the CPSC's compliance staff. The listing of these factors in the interpretative rule helps to make the risk analysis process more transparent to those who may not have experience in this area.

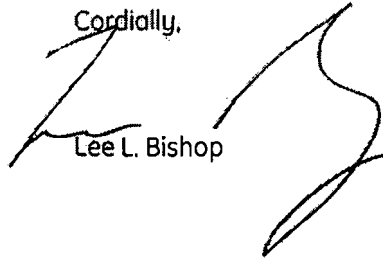
Todd A. Stevenson  
June 26, 2006  
Page 2

GE C&I also supports the recommendation in the AHAM comments, also made for purposes of transparency, that a formal appeal procedure be adopted to review preliminary hazard findings by the compliance staff.

Finally, GE C&I supports the request by AHAM for a formal penalty policy. We are familiar with the penalty policy adopted by the Environmental Protection Agency, and we believe that a similar effort could aid both the CPSC and the regulated community. The encouragement of self-evaluative and audit procedures in such a policy would be likely to lead to more safety analysis procedures by consumer product manufacturers, which would result in safer new products and quicker and more effective responses to unsafe product failures.

GE C&I strongly supports the adoption of the proposed modifications to the interpretative rule.

Cordially,



Lee L. Bishop

## Stevenson, Todd A.

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**From:** Bishop, Lee L (GE Indust, ConsInd) [LEE.BISHOP@GE.COM]  
**Sent:** Monday, June 26, 2006 4:46 PM  
**To:** Stevenson, Todd A.  
**Subject:** Comments on Substantial Product Hazard Interpretative Rule  
  
**Attachments:** Comments on sec 15.pdf



Comments on sec  
15.pdf (149 KB...

Please accept the attached as comments on the proposed revision of the interpretative rule. Thank you.

<<Comments on sec 15.pdf>>

Lee L. Bishop  
GE Consumer & Industrial  
Senior Counsel - Product Safety  
& Regulatory Compliance  
T 502 452 4078  
F 502 479-6944  
D \*334-4078  
E lee.bishop@ge.com  
www.ge.com  
Appliance Park, AP2-225  
Louisville, KY 40225, USA  
General Electric Company

# NAM CPSC Coalition



**Council of Manufacturing  
Associations**

Sept 16  
6

June 26, 2006

Mr. Todd Stevenson  
Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway, Room 502  
Bethesda, MD 20814

Re: Substantial Product Hazard Reports

Dear Mr. Stevenson:

The Consumer Product Safety Commission Coalition ("the Coalition") of the National Association of Manufacturers ("NAM") submits these comments in response to the CPSC's proposed revisions to the Interpretive Rules pertaining to Substantial Product Hazard Reports as published in the Federal Register May 26, 2006. The Coalition is a group of companies and trade associations that have a common interest in and are affected by the CPSC.

## *Introduction*

For several years, the Coalition has encouraged the Commission to provide better written guidance in the implementation of the Section 15 Substantial Product Hazard Reporting provisions. Manufacturers with defective products that constitute substantial product hazards are obliged to report to the Commission and, if needed, to take corrective action including recalls. However, the law and current implementing regulations are vague and ambiguous. It is difficult for manufacturers, especially small businesses, to determine when reporting and corrective action is necessary.

The Coalition applauds the Commission's efforts to clarify the reporting process through these proposed revisions and supports their adoption in whole.

## *Definition of "Defect"*

The revision adds four additional criteria that Commission staff use to evaluate whether a risk of injury is the type of risk that will render a product defective, potentially triggering a reporting obligation. Those four additional criteria are: the obviousness of risk, the adequacy of warnings and instructions to mitigate risk, the role of consumer misuse of the product and the foreseeability of such misuse.

The Coalition believes the addition of these four criteria will better enable the Commission and staff to evaluate whether the risk of injury associated with a product is

the type of risk that could render a product defective and provide more clarity to product manufacturers as well in deciding if reporting is necessary.

#### *Number of Defective Products Distributed in Commerce*

In this proposed revision, the Commission clarifies that in evaluating the substantial risk of injury of a particular consumer product, it take into account that risk of injury from a product may decline over time as the number of products being used by consumers decreases.

It is safe to say that many consumer products are not meant to be used indefinitely. The coalition agrees that it is reasonable for a manufacturer to take into account the age of a product when considering the reportability of a potential hazard.

#### *Compliance with Product Safety Standards*

This new section seeks to further explain how the Commission views compliance with any applicable voluntary or mandatory standards, particularly as compliance or non-compliance may be considered by the Commission and staff in evaluating Section 15 (b) obligations.

The Coalition agrees with this additional new section and believes that in respect to Hazard Reporting under Section 15, compliance with mandatory or voluntary safety-related standards is relevant when considering whether or not a substantial product hazard should be reported to the Commission.

#### *Conclusion*

The Coalition appreciates the opportunity to comment of the proposed revisions to the Interpretive Rules pertaining to Substantial Product Hazard Reports. By helping to clarify the process in which potential hazardous defects are reported to the Commission, consumer product manufacturers can better address the safety of the public through a greater understanding of the considerations they must undertake.

Sincerely,



David Asselin  
Executive Director, Council of Manufacturing Associations  
For the NAM CPSC Coalition

cc: John Gibson Mullan

**Stevenson, Todd A.**

---

**From:** Dave Asselin [DAsselin@nam.org]  
**Sent:** Monday, June 26, 2006 5:07 PM  
**To:** Stevenson, Todd A.  
**Subject:** Comments on Substantial Products Hazard Reports  
**Attachments:** CPSC comments 6.26.06.doc

Please see attached comments.

Sincerely,  
David A. Asselin

*Dave Asselin  
Executive Director, Council of Manufacturing Associations  
Vice President, National Association of Manufacturers  
1331 Pennsylvania Avenue, NW, Suite 600  
Washington, DC 20004  
Tel: (202) 637-3102 Fax: (202) 637-3182  
Visit our website at [www.nam.org/council](http://www.nam.org/council)*

6/27/2006



NATIONAL ASSOCIATION OF STATE FIRE MARSHALS  
Executive Committee

June 26, 2006

Office of the Secretary  
US Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

CPSC/OFC OF THE SECRETARY  
FREEDOM OF INFORMATION  
2006 JUN 26 P 3:52

RE: Substantial Product Hazard Reports

This communication represents an initial response from the National Association of State Fire Marshals (NASFM) to the Commission's May 26 *Federal Register* notice proposing revisions to the interpretive rules regarding determination of substantial product hazards. We hope that the Commission will be amenable to keeping this docket open for future correspondence from NASFM and others even beyond the stated date that comments must be received.

While NASFM is generally in favor of any additional guidance that would help both manufacturers and the Commission to make responsible decisions about whether a product is defective, and whether a particular defect rises to the level of being reportable, we are unclear about the effect of the proposed changes to this goal. Our concerns are embodied in two major questions, which we hope the Commission will be able to answer for the record. Both questions relate to the proposed revisions about compliance with voluntary and mandatory standards.

- ***How would the Commission address a situation where a product meets a standard (either mandatory or voluntary), but it subsequently is determined that the standard is inadequate?***

As examples, we cite the effects of CPSC-led investigations of sprinkler failures over the past decade.

Recalls of Omega O-ring sprinklers beginning in 1998 eventually led to the revision of UL 199, the Standard for Safety for Automatic Sprinklers for Fire Protection Service. The standard was revised in July 2001 in several ways that would better address potential causes of sprinkler failure in the future. Significantly, among the revisions was that O-ring water seal constructions in sprinklers would no longer be

permitted by the standard after January 2003. However, the O-ring sprinklers involved in the recall met that particular standard at the time the recall was issued.

Similarly, the CPSC's inquiry into Star Dry Fire Sprinklers leading to recalls of several models beginning in 1999 resulted in a revision to National Fire Protection Association (NFPA) 25: Standard for Inspection, Testing and Maintenance of Water-Based Fire Protection Systems. NFPA 25 now advises that all dry sprinklers that have been in service for 10 years or more be immediately replaced or tested. At the time the initial recalls involving these products were issued, there was no such provision in NFPA 25; they passed the standard.

- ***How would the Commission deal with a case in which a standard may not exist to address a particular hazard or is still in development but not yet finalized?***

The International Electrotechnical Commission (IEC) has recognized the potential hazard presented by certain information technology and consumer electronic (IT and CE) equipment when their outer housings are subjected to a small open flame. The IEC is working on a candle ignition technical specification that will eventually become part of a comprehensive package of standards within its Technical Committee 108 for these products. But while it may be some time before these standards are finalized and adopted, consumers unknowingly are purchasing IT and CE equipment that will ignite quickly and burn severely if exposed to an open flame.

To demonstrate this hazard, we cite preliminary fire screening tests conducted last month by NASFM at the New Hampshire State Fire Training Academy, in which flat-screen displays (monitors and televisions) were subjected to candle flames for a minimum of three minutes each. A DVD of these tests and a corresponding list identifying the products tested are enclosed as part of this submission. (The video footage of these tests is also accessible on the NASFM website at [http://www.firemarshals.org/mission/residential/fuels/it\\_and\\_consumer\\_electronics.asp](http://www.firemarshals.org/mission/residential/fuels/it_and_consumer_electronics.asp).)

As the Commission well knows, candle fires represent a serious challenge. According to a 2005 report entitled "Home Candle Fires," from the National Fire Protection Association, "Reported home candle fires have tripled since their low in 1990. Two-fifths started in the bedroom, while the living room, family room or den was the leading area of origin for fire deaths. Half of the home candle fires occurred when some type of combustible was too close to the candle; an unattended or abandoned candle was a factor in 18% of these fires. Falling asleep was a factor in 12% of the incidents."

Firesetting by children is another source of ignition for IT and CE equipment, which is often found in children's bedrooms. Children account for more than half of all arson arrests and the vast majority of fires ignited by children do not result in arrests.

More often than not, younger children set fires in bedrooms – and they place themselves most at risk. According to the United States Fire Administration (USFA), fires set by children result in 10.1 deaths for every 1,000 fires as compared to 7.7 deaths per 1,000 fires from all causes.

The point NASFM wishes to convey is that not all standards can be said to address all hazards, and the very discovery of product defects and the actions taken to address them often result in new standards or improvements to existing standards. Is this possibility jeopardized by an initial determination (by either the manufacturer or the Commission) that a product meets a standard that is already on the books, even if that standard is inadequate or does not address the hazard in question? Would it result in a reduced obligation by a manufacturer to report a potential product hazard?

We hope that you will take these questions and examples into account when deciding how to act on the proposed revisions. Additionally, we hope to see a written response from the Commission to the questions raised in this letter.

Thank you for the opportunity to comment and for placing this letter and its enclosures in the public record.

Sincerely,

A handwritten signature in black ink, appearing to read "James A. Burns", with a stylized, cursive script.

James A. Burns  
President

Enclosures:

1. DVD of preliminary consumer electronic and information technology equipment fire testing by NASFM
2. Description of products involved in tests mentioned above

## **PRODUCT DESCRIPTIONS**

Preliminary fire screening tests conducted at the  
New Hampshire State Fire Training Academy  
May 2006

**Product #1**

Sony Bravia LCD television

**Product #2**

Olevia I26LX LCD television

*Back manufactured Sept. 2005; Front bezel manufactured Feb. 2006*

**Product #3**

Lenovo L171 flat panel monitor

**Product #4**

Samsung 930B flat panel monitor

*Manufactured Feb. 2006*

**Product #5**

Panasonic TC-26LX60 LCD television

**Product #6**

Hewlett-Packard Pavillion F1905 flat panel monitor

**Product #7**

Dell E196FPF flat panel monitor

*Manufactured Feb. 2006*

**Product #8**

Dell 1906 FPT flat panel monitor

*Manufactured Aug. 2005*

Note: video footage of these tests can be viewed at  
[http://www.firemarshals.org/mission/residential/fuels/it\\_and\\_consumer\\_electronics.asp](http://www.firemarshals.org/mission/residential/fuels/it_and_consumer_electronics.asp)

## Stevenson, Todd A.

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**From:** James Burns [jburns@firemarshals.org]  
**Sent:** Monday, June 26, 2006 3:44 PM  
**To:** Stevenson, Todd A.  
**Subject:** Substantial Product Hazard Reports

**Importance:** High

**Attachments:** NASFMsbstlprodhazjun06.pdf

This communication represents an initial response from the National Association of State Fire Marshals (NASFM) to the Commission's May 26 Federal Register notice proposing revisions to the interpretive rules regarding determination of substantial product hazards.

Attached is a letter from me with our comments to the notice and additional reference materials. The original letter and the DVD referenced in the attachment will be delivered to your office on Tuesday, June 27th via messenger.

Please reply by email if you have any questions or need any additional information.

Sincerely,

James Burns  
President  
National Association of State Fire Marshals



NASFMsbstlprodhaz  
jun06.pdf (75...

See 19  
comment  
8



CPSC/OFC OF THE SECRETARY  
FREEDOM OF INFORMATION

THE ART & CREATIVE  
MATERIALS INSTITUTE, INC.

JUN 26 P 3:51

1280 Main St., 2nd Fl., P.O. Box 479  
Hanson, MA 02341 USA

Tel. (781) 293-4100 Fax (781) 294-0808

Web Address: [www.acminet.org](http://www.acminet.org)

Deborah M. Fanning, CAE  
Executive Vice President

Deborah S. Gustafson  
Associate Director

June 26, 2006

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Re: Substantial Product Hazard Reports

Dear Sir:

These comments are being submitted by The Art and Creative Materials Institute, Inc. (ACMI). We have reviewed the Consumer Product Safety Commission (CPSC) proposal that appeared in the Federal Register for May 26, 2006 at pages 30250 through 30252. The members of ACMI have generally not been required to file any Section 15b Reports since the Labeling of Hazardous Art Materials Act (LHAMA) became law in 1988 which we believe is attributable to ACMI Certification Program participation. One member did have to report brush handles that contained excess lead for a product that was at the time not subject to ACMI certification.

We believe that CPSC's attempt to clarify the Substantial Product Hazard Reporting rule is a positive action on the part of CPSC. New Section 1115.8 provides recognition for the efforts of the voluntary standards development organizations throughout the United States. While the ASTM D 4236 standard, encoded into the Federal Hazardous Substances Act (FHSA) by the passage of LHAMA, is now a mandatory standard, ACMI is also involved in the development of other related standards for product performance or product safety. In almost all of the voluntary standards development activities, there is usually participation by CPSC staff. This new Section is an appropriate addition. The other proposed amendments will also aid manufacturers as well.

LOOK FOR THESE SEALS.....



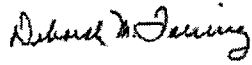
Office of the Secretary  
Consumer Product Safety Commission

June 23, 2006

ACMI believes that CPSC should publish the proposed revision as a final rule and continue efforts from time to time to clarify manufacturers' reporting obligations. Many small companies are not equipped to perform the kind of analysis that is required by the regulation and efforts to clarify manufacturers' obligations are to be applauded.

Finally, ACMI believes that CPSC should also proceed with an interpretative regulation related to the statutory factors for the assessment of civil penalties.

Respectfully yours,

A handwritten signature in cursive script, appearing to read "Deborah M. Fanning".

Deborah M. Fanning, CAE  
Executive Vice President  
The Art and Creative Materials Institute, Inc.

Of Counsel  
Martin J. Neville, Esq.  
Mary Martha McNamara, Esq.

**Stevenson, Todd A.**

---

**From:** Debbie Fanning [debbief@acminet.org]  
**Sent:** Monday, June 26, 2006 2:23 PM  
**To:** Stevenson, Todd A.  
**Cc:** Mary Martha McNamara; Martin J. Neville  
**Subject:** Section 15b Proposal  
**Attachments:** Section 15b Reports Comments.pdf

Attached are ACMI's comments on the proposed revision to the Section 15b reports.

Deborah M. Fanning, CAE  
Executive Vice President  
The Art & Creative Materials Institute, Inc.  
P. O. Box 479  
Hanson, MA 02341-0479 USA  
Tel: 781-293-4100  
Fax: 781-294-0808  
<mailto:debbief@acminet.org>  
<http://www.acminet.org>

\*\*\*\*\*

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6/26/2006

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Como  
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June 26, 2006

**HAND DELIVERY**

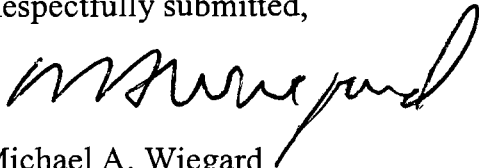
Mr. Todd A. Stevenson  
Freedom of Information Officer  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway, Suite 502  
Bethesda, MD 20814-4408

Re: Substantial Product Hazard Reports

Dear Mr. Stevenson:

Enclosed are joint comments by American Honda Motor Co., Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc., and Yamaha Motor Corporation, U.S.A. on the Consumer Product Safety Commission's proposed revisions to its interpretative rule under Section 15 of the Consumer Product Safety Act. (71 Fed. Reg. 30,350 (May 26, 2006)).

Respectfully submitted,



Michael A. Wiegard  
Counsel for Kawasaki Motors Corp., U.S.A.

*Enclosure*

MAW:aca

CPSC/OFC OF THE SECRETARY  
FREEDOM OF INFORMATION  
2006 JUN 26 P 3:52

**JOINT COMMENTS OF  
AMERICAN HONDA MOTOR CO., INC.,  
KAWASAKI MOTORS CORP., U.S.A.,  
POLARIS INDUSTRIES INC., and  
YAMAHA MOTOR CORPORATION, U.S.A.**

## Substantial Product Hazard Reports

**June 26, 2006**

## **INTRODUCTION**

American Honda Motor Co., Inc., Kawasaki Motors Corp., U.S.A, Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A. (the “Companies”) appreciate the opportunity to comment on the U.S. Consumer Product Safety Commission’s (“CPSC” or the “Commission”) proposed revision to its interpretative rule advising manufacturers, distributors and retailers how to comply with the requirements of Section 15(b) of the Consumer Product Safety Act (“CPSA”), 15 U.S.C. §2064(b). 71 Fed. Reg. 30,350 (May 26, 2006). As explained more fully below, the Companies support the proposed revisions, and believe that making these changes to the interpretative regulations will provide clearer guidance to the regulated community regarding CPSC’s view of reporting obligations under Section 15(b) of the CPSA.

### **A. Definition of “Defect”**

The interpretative rule currently provides that in determining whether the risk of injury associated with a product renders the product defective and subject to notification and recall under Section 15, the Commission and its staff will consider various specified criteria, including: the utility of the product; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission’s own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability and other factors

relevant to the determination. 16 C.F.R. §1115.4. The Commission is proposing to revise this section of the interpretative rule to expand this listing of factors that will be relevant in making such determinations to explicitly include the following four considerations: the obviousness of such risk of injury; the adequacy of warnings and instructions to mitigate such risk; the role of consumer misuse of the products; and, the foreseeability of such misuse.

Under the case law in the area of products liability, these four criteria are well established as factors relevant to the determination of whether a product contains a defect which causes injury. See Restatement Third, Torts: Products Liability §2, Comments i, j, m and p. As noted above, the CPSC's interpretative rule specifies product liability case law as one of the factors the Commission staff will consider in determining whether a product is defective for purposes of Section 15. The four criteria identified in the proposal are therefore currently relevant and necessary criteria to consider in making defect determinations under Section 15.

Moreover, these factors are particularly important with respect to complex motorized products, such as all-terrain vehicles, snowmobiles, off-road motorcycles and riding lawnmowers, which necessarily feature detailed warnings and instructions and present serious risks of injury if misused. The Companies believe these four factors should be explicitly and separately stated in 16 C.F.R. §1115.4 to avoid any potential implication that these criteria are less relevant or

important to the determination of whether a defect is present than those that are currently listed in the interpretative rule. Specification of these four criteria will also serve to clarify the Commission's interpretation of Section 15 for members of the regulated community who may not be as familiar with the specific principles of the case law in the area of product liability.

**B. Number of Defective Products in Commerce**

The criteria currently enumerated in the interpretative rule for determining whether a defect presents a substantial risk of injury to the public include consideration of the number of defective products distributed in commerce. 16 C.F.R. §1115.12(g)1(ii). The Companies support adding the further sentence proposed by CPSC to this section of the interpretative rule to recognize explicitly that despite the number of products initially distributed, the risk of injury to the public may decline as the number of products in use by consumers decreases over time.

**C. Compliance with Voluntary Product Safety Standards**

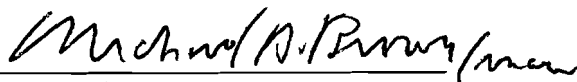
The Companies support CPSC's proposed addition to the interpretative rule of the explicit statement that CPSC considers compliance or non-compliance with voluntary product safety standards when making defect determinations under Section 15 of the CPSA, and in particular, the preliminary determination of whether that product presents a substantial product hazard. Established voluntary

product safety standards represent the consensus conclusion of all interested parties, including manufacturers, consumers, and in many cases the CPSC staff, on provisions that are necessary to protect the public with respect to the relevant products. Consideration of whether a product complies with these provisions is clearly appropriate in making a defect determination, and the interpretative rule should explicitly inform the regulated community that CPSC considers this factor when making determinations under Section 15.

### **CONCLUSION**

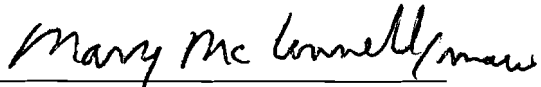
The Companies believe that the Commission's proposed amendments to its Section 15 interpretative rule will provide the regulated community with further clarification regarding the CPSC's approach to substantial product hazard determinations. We urge CPSC to make final the proposed revisions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael A. Brown", is written over a horizontal line.

Michael A. Brown.  
BROWN & GIDDING, P.C.  
3201 New Mexico Avenue, N.W.  
Suite 242  
Washington, DC 20016

*Counsel for American Honda Motor, Co., Inc.*



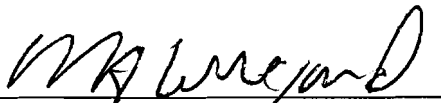
Mary McConnell  
POLARIS INDUSTRIES INC.  
2100 Highway 55  
Medina, MN 55340-9770

*Counsel for Polaris Industries Inc.*



David P. Murray  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, N.W.  
Washington, DC 20006

*Counsel for Yamaha Motor Corporation, U.S.A.*



Michael A. Wiegand  
ECKERT SEAMANS CHERIN &  
MELLOTT, LLC  
1747 Pennsylvania Avenue, N.W.  
12<sup>th</sup> Floor  
Washington, DC 20006

*Counsel for Kawasaki Motors Corp., U.S.A.*

**LOCKER GREENBERG & BRAININ, PC  
ATTORNEYS AT LAW**

Sec 15  
10

FREDERICK B. LOCKER  
EMAIL: fblocker@lockerlaw.com

420 FIFTH AVENUE, NEW YORK, N.Y. 10018  
TELEPHONE (212) 391-5200, Ext. 16  
TELECOPIER (212) 391-2035

June 26, 2006

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway, Room 502  
Bethesda, MD 20814  
Attention: Todd Stevenson, Secretary

**Re: "Substantial Product Hazard Reports"  
Evaluation of Section 15 Interpretative Regulations**

Dear Mr. Stevenson:

We represent the Toy Industry Association, Inc. We previously wrote in support of clarifications to the Commission's Section 15 regulation on June 30, 2004. At that time we noted that the cumulative impact of the Commission's Section 15 interpretative regulation upon industries and consumers is significant and rivals or is greater than the impact of regulatory action undertaken through the promulgation of standards or rules under the Consumer Product Safety Act or under the Transferred Acts.

We proposed, and continue to emphasize, that the following changes in the regulation should be considered by the Commission:

1. **The Role of Voluntary Standards and Compliance with CPSC Regulations.**

The interpretative regulations make no reference to the role of compliance with the voluntary standard. They should contain a statement that the voluntary standard represents the "state of the art." Similarly, compliance with a regulation (although often stated by the staff to be a minimum legal requirement) should be regarded as presumptive evidence of the absence of defect. Compliance with voluntary standards or the regulations promulgated by the CPSC should presumptively preclude a finding of defect under Section 15 or a determination that a product presents an unreasonable risk of serious injury. The regulations issued by the Commission under the Federal Hazardous Substances Act which address the safety of toys and children's products declare that non-complying products present "an unreasonable risk of injury." Products which comply with the regulations, at the very least, for a Section 15 determination should presumptively preclude a finding of unreasonable risk of injury, absent establishment by a preponderance of the evidence of a production defect.

In making this proposal, we do not suggest that such complying products cannot be defective or present an unreasonable risk of serious injury by reason of factors not addressed in the standard or regulation. Contrary to comments of some critics of such proposal, this does not establish a regulatory "safe harbor" but recognizes that conformance to such standards, which often represents current common good practices, need to be given adequate consideration. Federal regulatory agencies are clear when they elect to affirmatively establish safe harbors in their regulatory frameworks. The Commission should, however, affirmatively recognize the broad safety net provided by the increasing number of voluntary product safety standards developed with organizations such as ANSI, ASTM, UL, ISO and other standards development organizations. This philosophy is consistent with the Commission's enabling statutes which already require deference to voluntary standards which effectively address hazards, in lieu of mandatory rulemaking.

**2. Incidents Are Not Defects.**

The Staff continues in many cases to count incidents associated with a product as evidence of a defect, especially when incidents occur through misuse of a product. The statute and the regulation require reporting of defective products which could create a substantial risk of injury to the public or which present an unreasonable risk of serious injury or death. The determination that a product is defective or that it presents an unreasonable risk of injury is a necessary precondition to the obligation to file a Section 15 report. It is not, and should not, be determined merely by the presence of incident reports. Incident reports may provide insight into production defects but that analysis is independent of the number of complaints received. There is a need to focus on better defining "unreasonable risk of serious injury or death" as that term is employed in 16 CFR 1115.6. In the context of that definition, unreasonable consumer misuse of a product needs to be excluded from inclusion.

**3. Conduct an Internal Review of the Compliance Staff Recommendations Before Authorizing the issuance of a Complaint under Section 15.**

We suggest that the Office of General Counsel, or the General Counsel, review prospective complaints before they are taken to the Commission. This process should provide an independent and informal review of complaints and arguments before the issuance of a Section 15 complaint against a prospective respondent. General Counsel should act as an independent reviewer of the legal adequacy of the allegations made by Complaint Counsel in a proposed complaint. This process would provide an opportunity for independent review, prior to the institution of costly litigation, and enable the Commission to better monitor authority delegated to the staff.

**4. Add a Provision for Joinder or Intervention.**

Many issues raised in Section 15 litigation affect the business community at large. The rules for adjudicative proceeding should permit interested parties to join or intervene upon application to the Administrative Law Judge.

**5. Encourage Voluntary Reporting and Prompt Disclosure**

In assessing a penalty for a late report, consideration should be given to a company which voluntarily reports a defective condition "without waiting to be caught" in a Commission investigation. EPA offers a 75% discount to firms which voluntarily report instead of waiting to face an external audit conducted by the EPA. When a defective product which could create a substantial risk of injury to the public or which presents an unreasonable risk of serious injury or death is discovered, it should be promptly reported under Section 15 regulations. In order to be eligible a regulated entity should find reportable conditions on its own and disclose them promptly instead of waiting for a CPSC investigation of the product or a third party complaint. This policy would not apply to a company which is engaged in a repeat violation within a three-year period nor would it apply to products which cause injury or death. It has been suggested that whatever the factors utilized, a formula based penalty policy should be adopted.

**6. Fast Track Corrective Action**

The Commission should make it clear that companies that participate in the CPSC's fast track program will not face subsequent Section 15 investigations or actions related to the timeliness of reporting which is predicated upon a requisite Section 15 determination or determination of violation of standards. This concept would provide a significant benefit to the public, since we believe it would promote increased self reporting and corrective action implementation, without consumption of valuable agency resources. Most reporting entities would need to be made aware of this clear benefit.

**7. Encourage Clarification Of Process By Which Civil Penalties Are Levied**

Specific examples need to be provided so companies have a better understanding of situations requiring reporting. In addition, distinctions should be made between assessing civil penalties based upon sale of products which violate applicable mandatory standards, as opposed to assessment of civil penalties arising from failures to report injury complaints. Currently, penalties are assessed based upon number of violative products sold. This process is not suitable when the issue relates to failure to report incidents involving unreasonable risk of serious injury or death. In such cases, the failure to report the incident should be the basis for assessing the civil penalty rather than the unit sales of a product. The differences in the nature of a violation also need to be recognized as a basis for fairly assessing such penalties.

**We Support the Proposals**

The proposed changes are a step in the right direction towards clarifying existing criteria which the existing regulation mandates. The revision adds four additional criteria that Commission staff use to evaluate whether a risk of injury is the type of risk that will render a product defective. These are: "the obviousness of risk, the adequacy of warnings and instructions to mitigate risk, the role of consumer misuse of the product and the foreseeability of such misuse".

This will help the staff to evaluate whether a product is “defective” and provides greater clarity to the public about the factors to be considered in making such determinations. The proposal also recommends that in evaluating the substantial risk of injury of a particular consumer product, the staff should consider if such risk may decline over time as the number of products being used by consumers decrease. This is consistent with current evaluations in risk science and relates to the  
June 26, 2006  
Page Four

likelihood of risk. Many products have short useful lives or are subject to life cycle limitations. This is clearly a relevant factor to be considered in determining real world risk to the public. Finally, as noted above, compliance with existing mandatory or voluntary safety-related standards are relative considerations whether or not a substantial product hazard exists and should be fully considered by the staff.

Therefore, we support such proposals.

Very truly yours,  
*Frederick Locker*  
Frederick Locker

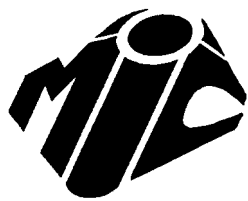
**Stevenson, Todd A.**

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**From:** Rick Locker [fblocker@LockerLaw.com]  
**Sent:** Monday, June 26, 2006 6:40 PM  
**To:** Stevenson, Todd A.  
**Subject:** Substantial Product Hazard Reports  
**Attachments:** CPSC Section 15 Regulation evaluation.rtf

**Locker Greenberg & Brainin PC**  
**Frederick Locker**  
***Attorney At Law***  
**420 Fifth Avenue**  
**New York NY 10018**  
**tel: 212-391-5200 XT 16**  
**fax: 212-391-2035**

6/27/2006



**Motorcycle Industry Council**

*Sect 15*

June 26, 2006

Consumer Product Safety Commission  
Office of the Secretary  
4330 East West Highway  
Bethesda, MD 20814

Re: Substantial Product Hazard Reports  
(71 *Federal Register*, 30350, May 26, 2006)

Dear Sir or Madam:

The Motorcycle Industry Council (MIC) is a not-for-profit, national trade association representing manufacturers and distributors of motorcycles, scooters, motorcycle/ATV parts and accessories and members of allied trades.

MIC, on behalf of our 338 member companies, is pleased to make the following comment in support of the proposed revision to the interpretative rule regarding "Substantial Product Hazard Reports." Explicitly acknowledging that the various factors considered by the Commission and staff include the *obviousness of risk of injury, the adequacy of warnings and instructions, the role of consumer misuse and the foreseeability of such misuse*, will strengthen the rule. These factors are valuable in assessing whether the product in question poses a risk per se or whether there are other factors that should be considered. We believe CPSC should explicitly confirm that these factors should be given the same weight and consideration in making any determination as those currently listed in the rule.

With respect to motorized vehicles such as off-highway motorcycles and all-terrain vehicles, it is particularly important to include for consideration issues such as those dealing with consumer misuse of the product and foreseeability of such misuse. There are all too many instances where a product is "misused" by ignoring warned against behaviors and when subsequent difficulty arises, a product defect is then alleged. The inclusion of a critical evaluation of consumer actions in the mix of factors involved in making a defect determination will result in a more judicious outcome.

We also concur in the view of the Commission that the risk of injury may indeed decline over time as the numbers of a particular product being used by consumers decreases. There certainly are instances where a product's useful life will far exceed that which was initially contemplated in the development and marketing of the product. This particularly can be true with respect to motorized vehicles where the owner adheres to a strong regimen of meticulous care and the pattern of use is relatively benign. Another aspect of product longevity, again with respect to motorized vehicles but the opposite of that just described, is the propensity for some vehicles to be aggressively used and to be traded or re-sold, often more than once. Additionally, these vehicles frequently may be modified in significant ways to suit the need or whim of the current owner. For the most part, such vehicles will be impossible for the original manufacturer to track and may well have been reconfigured in a process that may include the use of many non-original component parts. In circumstances such as these, it is also problematic that a manufacturer could have firsthand knowledge of any problem arising that might incur a reporting obligation.

MIC firmly supports the development of appropriate uniform product safety standards and their use as an enforcement tool for universal compliance as a way to help assure that only the best and safest products reach the marketplace. However, the general characterization or implication that all standards

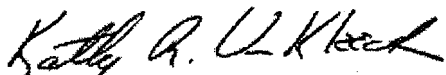
are "safety" standards over uses the word. For the most part "standards" establish performance requirements for materials, components, test methodology, conformity assessment, recommended practices, etc., which will result in a better product of more uniform quality with safety certainly being an important attribute. Therefore it would seem only reasonable and proper for the Commission and staff to consider compliance with mandatory standards in making appropriate determinations under the CPSA authorities. It seems equally clear that adherence to a relevant voluntary standard should also be included in such deliberations.

The Commission, in providing this interpretative guidance, adds emphasis on compliance with voluntary standards as relevant to its exercise of authority in determining whether a product presents a substantial hazard and for appropriate reporting and corrective action. As indicated, this is not only reasonable but also singularly important. A voluntary standard, by nature of its development and maintenance, is a living document that includes a process for regular review to assure continued currency and relevance. An additional advantage is there are specific, straightforward procedures prescribed for making necessary changes. The ability to make revisions to a mandatory standard that requires a change in law or agency regulation is typically far more difficult.

When determining compliance with voluntary standards, the Commission and staff, as well as product manufacturers, need to keep in mind the extent and scope of standards activities to insure that any determinations focus on relevancy and not just on standards per se. In 2000, the Department of Commerce estimated there were over 600 organizations in the U.S. that develop voluntary standards and that there are about 100,000 standards in an active status. Certainly not all fall within the reach of the Commission's mandate, but a number do. For example, there is no U.S. voluntary or mandatory standard for construction of off-highway motorcycles, however, there is a standard for essentially all materials, electrics, nuts and bolts and component parts going into the vehicle. A manufacturer may build a machine that incorporates non-standard compliant components by choice. This in and of itself should not lead to a determination of non-compliance under section 15, but only an element to be considered in terms of relevance.

MIC supports the proposed revisions to the interpretative rule regarding compliance with section 15 (b) of the Consumer Product Safety Act and urges they be adopted as proposed.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Kathy R. Van Kleeck". The signature is fluid and cursive, with the first name "Kathy" being more prominent.

Kathy R. Van Kleeck  
Sr. Vice President, Government Relations

**Stevenson, Todd A.**

---

**From:** Kathy Van Kleeck [kvankleeck@mic.org]  
**Sent:** Monday, June 26, 2006 4:46 PM  
**To:** Stevenson, Todd A.  
**Subject:** Substantial Product Hazard Reports

**Attachments:** CPSC Substantial Product Hazard Reports-MIC Comments.doc



CPSC Substantial  
Product Hazard...

Attached please find the Motorcycle Industry Council's comments on Substantial Product Hazard Reports (71 Federal Register, 30350, May 26, 2006).

Thank you for your attention.

Kathy R. Van Kleeck  
Sr. Vice President, Government Relations Motorcycle Industry Council  
1235 South Clark Street  
Suite 600  
Arlington, VA 22202

Set  
June  
12



[cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov)

June 26, 2006

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

RE: Substantial Product Hazard Reports; Proposed Revision to Interpretative Rule, 71 Federal Register 30350.

Dear Sir/Madam:

These comments are submitted on behalf of the Consumer Specialty Products Association (CSPA), regarding the CPSC's proposed revision to the interpretative rule on substantial product hazard reports, 71 Federal Register 30350. CSPA is a trade association representing some 260 companies engaged in the manufacture, formulation, distribution and sale of non-agricultural pesticides, antimicrobials, as well as aerosol products, scented candles and air fresheners, automotive products, detergents and cleaning compounds, and polishes and floor finishes for home, institutional and industrial use.

CSPA supports the Commission's effort to provide further guidance to the regulated industry on the reporting obligations of section 15(b) of the Consumer Product Safety Act, 15 U.S.C. 2064(b). We also support the Commission's effort to explain the factors that are used in the decision making process and we believe that it is reasonable to codify such factors. It is important that the Commission thoroughly explain the process by which the new criteria will be used in the decision making process. This is necessary to ensure that the 15(b) reporting process is fair

CSPA offers the following comments on the proposal:

Number of Defective Products

The proposal recognizes that that the risk of injury from a product may decline over time as the number of products being used by consumers decreases, has the potential to mislead a manufacturer or retailer. If a manufacturer or retailer decided not to report a potential defect with a product simply because it had been in the marketplace for a period of time, the company would risk having an action brought against it by the Compliance staff for substantial civil penalties. We believe this provision is more relevant to the corrective action plan than to determining whether to report a product defect.

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### Compliance with Product Safety Standards

The language in the proposal has the potential to make voluntary standards *de facto* mandatory standards. For example, CPSC "strongly encourages all firms to comply with voluntary consumer product safety standards and advises that where appropriate, compliance or non-compliance with such standards may be considered by the Commission and staff in exercising its authority under the CPSA." Also, "CPSA requires that firms... report to the Commission any products which do not comply with either mandatory standards or voluntary standards upon which the Commission has relied."

It would be more appropriate for the Commission to consider whether companies have "evaluated or considered" voluntary standards when making a determination regarding defect. CSPA supports voluntary standards, but in some cases they may not make sense for a particular product. A company may also have a more stringent process than the voluntary standard. It is important that "voluntary" standards remain voluntary.

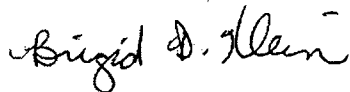
### Other Issues

In addition to the proposed revisions, we encourage the CPSC to consider and evaluate whether a consumer product is counterfeit when making a substantial product hazard determination. The increased manufacture, distribution, and sale of counterfeit consumer products poses a serious threat to consumer safety, not to mention the U.S. economy and the business community. This issue will only increase in urgency as the number of counterfeit consumer product imports continues to rise, particularly from countries with weaker intellectual property protection laws and enforcement.

CSPA welcomes the Commission's announcement that it may also consider adopting an interpretive rule related to the statutory factors for assessing civil penalties under section 20 of the CPSA. A clear, concise, written enforcement policy that goes beyond the basic criteria listed in section 20(b) of the CPSA would contribute to clarify the process of how, why, and when the Commission staff determine the need to assess civil penalties against a particular company.

CSPA appreciates the opportunity to comment. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Brigid D. Klein". The signature is written in a cursive, flowing style.

Brigid D. Klein  
Deputy General Counsel

**Stevenson, Todd A.**

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**From:** Brigid Klein [bklein@cspa.org]  
**Sent:** Monday, June 26, 2006 11:51 AM  
**To:** Stevenson, Todd A.  
**Subject:** Comments on Substantial Product Hazard Reports  
**Attachments:** CSPA comments on 15b.doc

Attached are the comments of the Consumer Specialty Products Association (CSPA) regarding the proposed revisions to the interpretative rule on 15(b). Please let me know if you have any questions. Thanks, Brigid Klein

6/26/2006

Set 1's  
Comments  
13



June 26, 2006

Kenneth M. Suggs  
President

500 Taylor Street  
Columbia, SC 29202  
803-256-7550  
803-252-7145 Fax

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

**Re: Substantial Product Hazard Reports**

Dear Secretary:

The Association of Trial Lawyers of America ("ATLA") hereby submits comments in response to the Consumer Product Safety Commission's ("CPSC") proposed revisions to its interpretative rules advising manufacturers, distributors, and retailers of consumer products how to comply with the requirements of Section 15(b) of the Consumer Product Safety Act ("hazard reporting rules"). See 71 Fed. Reg. 30350.

ATLA, with 60,000 members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. ATLA applauds the Commission's goals of improving "guidance, clarity, and transparency" with respect to hazard reporting rules. However, ATLA believes the proposed revisions accomplish none of these goals. Indeed, the proposal, if adopted, would provide less consistent reporting guidance, increasing the likelihood that product defects known to manufacturers, distributors, or retailers will not be disclosed to the Commission and the public. For these reasons, ATLA recommends that the Commission withdraw the proposed changes to the hazard reporting rules.

**I. ATLA's General Concerns Regarding the Proposed Revisions**

ATLA has two key concerns with the CPSC's proposed revisions. First, the proposed revisions do not satisfy the Commission's purported goals. Second, the documented involvement by associations representing large corporations undermines any positive effects generated from these revisions.

**A. *Proposed Revisions Do Not Satisfy CPSC's Goal of Improving Clarity***

The Commission's proposed revisions add the following factors for CPSC Staff to use to evaluate the existence of a defect:

- The obviousness of the risk;

The Leonard M. Ring  
Law Center

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Washington, DC  
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202-965-3500  
www.atla.org

- The adequacy of warnings and instructions to mitigate the risk;
- The role of consumer misuse of the product; and
- The foreseeability of such misuse.<sup>1</sup>

By adding four factors to the definition of “defect,” the CPSC does not clarify corporations’ reporting obligations. The addition of these factors complicates the analysis, making it likely that different companies, faced with the same information, will make different reporting decisions. The proposed revisions will result in unpredictable variation among companies in what they report because they increase the number of factors a reporting entity may consider without specifying the weight to be given to each factor. Rather than provide guidance and clarity to manufacturers, the proposed revisions give them increased latitude to take a greater number of factors into account and to weigh those factors in whatever fashion they chose. The result is likely to be less reporting of defects.

*B. Proposed Revisions Do Not Satisfy CPSC’s Goal of Improving Transparency*

Likewise, the Commission’s proposed revisions will not improve the transparency of the hazard reporting process. Instead, they will have the opposite effect. The addition of the proposed four factors makes it less likely a manufacturer will identify a “defect” and, therefore, easier to evade the hazard reporting rules. The proposed revisions seem designed to provide a safe haven for manufacturers who do not disclose. The result will be less public awareness of products which might cause harm.

Public disclosure may lead to product liability litigation which, in turn, could result in much needed safety improvements in products and the prevention of additional injuries. *See, e.g., Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4<sup>th</sup> Cir. 1995) (case spurs company to put warnings on Tylenol after liver-related deaths); “Texas Judge Orders Release of Chrysler Minivan Documents to Public,” *Automotive Litigation Reporter*, Aug. 6, 1996 (class action lawsuit leads to Chrysler’s redesign of defective minivan door latches responsible for multiple deaths and injuries). Successful outcomes like these may not have occurred if attorneys were unable to bolster their cases with strong evidence based on the CPSC’s product hazard reports.

*C. Proposed Revisions are Suspect Given Involvement by Industries Charged with Reporting Defects*

The proposed revisions do not add clarity, guidance or transparency to the current reporting rules. Instead, they seem designed to create new opportunities for manufacturers not to report hazard defects to the Commission. Since these changes were suggested by industries responsible for reporting defects, were

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<sup>1</sup> 71 Fed. Reg. at 30351.

proposed after consultation with such industries but not consumers, and will benefit these industries, we believe the proposed changes are suspect. They should be withdrawn until the Commission takes the views of all affected stakeholders into account in developing revised reporting guidance.

## **II. ATLA's Concerns Regarding Specific Proposed Revisions**

ATLA also has concerns with specific changes to the regulations, namely the addition of new Section 1115.8 and the new language added to Section 1115.12.

### *A. Addition of New Section 1115.8 Creates Safe Harbor*

The proposed revisions add a new Section 1115.8, which provides that “compliance with applicable voluntary safety standards may be relevant to the Commission staff’s preliminary determination of whether that product represents a substantial product hazard.”<sup>2</sup> The revisions also note that compliance with a mandatory standard “will be considered by staff in making the determination of whether” the CPSC will institute a product recall.<sup>3</sup> This proposed section is particularly troublesome because it can amount to a safe harbor for corporations. Voluntary standards are commonly established by reporting companies. They often represent the least common denominator of agreement among manufacturers rather than adequate safety standards. It is likely that a product could comply with a voluntary or mandatory safety standard, yet a defect may exist beyond the scope of the standard. The purpose of hazard reporting is to shed light on inadequate voluntary standards rather than to acquiesce in the level of safety they offer. The Commission should not shield manufacturers of defective products from public scrutiny just because the manufacturer complied with an inadequate safety standard it set with other manufacturers.

The potential problems associated with the new Section 1115.8 can be illustrated by looking at recent CPSC recalls. For example, the CPSC issued voluntary recalls of certain cribs, some of which not only complied with mandatory and voluntary standards but also were “certified” by the Juvenile Products Manufacturers’ Association.<sup>4</sup> If the proposed language was adopted a year ago, crib manufacturers may not have reported the hazards that led to the recalls and claimed a safe harbor protection under this section.

### *B. Language Added to Section 1115.12 is Untrue*

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<sup>2</sup> *Id.* § 1115.8(a) (proposed).

<sup>3</sup> *Id.* § 1115.8(b) (proposed).

<sup>4</sup> See, e.g., *Recent Death Prompts Renewed Search for Simplicity Cribs with Graco Logo*, News from CPSC (Feb. 8, 2006); *CPSC, Child Craft Industries, Inc. Announce Recall of Cribs*, Recall Alert #06-504 (Oct. 18, 2005).

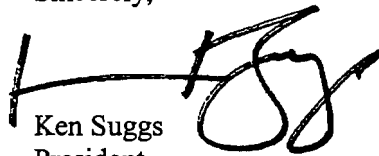
The proposed revisions indicate that the CPSC intends to add a sentence to Section 1115.12 stating that the "Commission also recognizes that the risk of injury from a product may decline over time as the number of products being used by consumers decreases."<sup>5</sup> This statement is untrue. The individual risk to a user from a defective product bears no relationship to the number of products in use. Rather the fewer products in use, the less likely it is that an individual will encounter or be aware of a product risk. It is in these instances that reporting of defects is most important because otherwise hazards may remain unknown to consumers. It also is unclear how this guidance will operate in practice, given that it does not specify who will have the burden of proving how many products are in use and how much longer consumers will continue to use them. For example, there is no indication as to how the CPSC would account for hand-me-down items (like cribs and other infant products) or items purchased from thrift or goodwill shops.

### III. Conclusion

ATLA respectfully requests that the CPSC withdraw its proposed revisions to the interpretative rules advising manufacturers, distributors, and retailers how to comply with Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. § 2064(b). The CPSC has not articulated any compelling need for these changes which will lead to reduced hazard reporting and possibly fewer or delayed recalls of defective products. The current "when in doubt, report" approach better achieves the Commission's goals of achieving clarity and transparency in the hazard reporting process. The use of additional factors to define a "defect" only adds to the confusion and ambiguity to the process and the addition of Section 1115.8 can even amount to a safe harbor protection for corporate wrongdoers.

ATLA appreciates this opportunity to submit comments on the Commission's proposed changes to its hazard reporting rules. If you have any questions or comments, please contact Gerie Voss, ATLA's Regulatory Counsel at (202) 965-3500 ext. 748.

Sincerely,

  
Ken Suggs  
President

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<sup>5</sup> 16 C.F.R. § 1115.12(g)(1)(ii) (proposed).

**Stevenson, Todd A.**

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**From:** Voss, Gerie [Gerie.Voss@atlahq.org]  
**Sent:** Monday, June 26, 2006 10:13 AM  
**To:** Stevenson, Todd A.  
**Subject:** [Possibly SPAM (header): ] - Substantial Product Hazard Reports - Email contains remote images

**Attachments:** CPSC Hazard Report Comments.pdf

Dear Sir or Madam:

Attached please find ATLA's comments regarding the above-referenced topic. Please feel free to call or email me if you have any questions or any problems accessing this document.

Thank you.

Sincerely,  
Gerie Voss

**Gerie Voss**  
Regulatory Counsel  
Association of Trial Lawyers of America  
1050 31st Street, NW  
Washington, DC 20007  
phone: 202-965-3500 x748 or 800-424-2725 x748  
fax: 202-342-5484  
e-mail: [gerie.voss@atlahq.org](mailto:gerie.voss@atlahq.org)



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6/26/2006

Subst. Prod Hazard 14

June 26, 2006

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Consumer Product Safety Commission  
Room 502  
4330 East-West Highway  
Bethesda, Maryland 20814  
Via: [cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov)  
"Substantial Product Hazard Reports"  
and Facsimile (301) 504-0127

**Comments of Consumers Union, Consumer Federation of America, Kids In Danger  
and the U.S. Public Interest Research Group  
to the Consumer Product Safety Commission on  
16 CFR Part 1115  
"Substantial Product Hazard Reports"  
Proposed Revision to Interpretive Rule**

**Introduction**

Consumers Union (CU), publisher of *Consumer Reports* magazine, Consumer Federation of America, Kids In Danger, and the U.S. Public Interest Research Group, collectively "Consumer Groups", submit the following comments in response to the Consumer Product Safety Commission's (CPSC) "Proposed revision to interpretive rule" on "Substantial Product Hazard Reports."<sup>1</sup> In its notice, the CPSC indicates that these proposed revisions are "to provide further guidance, clarity and transparency to the regulated community on reporting obligations under Section 15(b) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064(b)." See 71 Fed. Reg. 30350 (May 26, 2006), at 30350. As consumer groups long-committed to product safety and consumer protection, we fail to see the urgency or the necessity of providing industry with additional factors it can consider in deciding whether or not a product it manufactures, distributes, or sells, presents a substantial product hazard -- triggering a mandatory duty to report to the CPSC under Section 15(b). In the past, the CPSC has been clear about reporting requirements -- with a stated rule of "Report if in Doubt."<sup>2</sup> The CPSC raised this concern with this statement, below, in 1984:

"The Commission is concerned about the current level of reporting by firms under Section 15(b). The Commission believes that there is both a

<sup>1</sup>71 Fed. Reg. 30350 (May 26, 2006).

<sup>2</sup>See "Statement of Enforcement Policy on Substantial Product Hazard Reports," 49 Fed. Reg. 13820 (April 6, 1984). In this Statement, the CPSC states that Section 15 reports enable the Commission to obtain information at an early stage from knowledgeable sources . . . . These reports provide a key basis for evaluating a potential hazard and the need, if any, for corrective action in the form of public notice and/or recall.

substantial amount of underreporting of the most serious hazards as well as undue delay in filing reports.”<sup>3</sup>

We are concerned that these proposed revisions will not only fail to achieve their desired effect of clarifying the rules, but also may result in restricting the flow of critical product safety information to the Commission.

Under the CPSA, every manufacturer, distributor, or retailer must immediately inform the CPSC if it “obtains information that reasonably supports the conclusion that its product either:

(1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title; (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or (3) creates an unreasonable risk of serious injury or death.” See 15 U.S.C §§ 2064(b)(1), (b)(2), and (b)(3).<sup>4</sup>

The CPSC asserts that these changes will clarify the law -- we disagree. We are concerned that this proposal will, in fact, cloud the interpretation of the law, and the obligation to report under 15(b). We are also concerned that these proposed changes will shift the burden of weighing relevant factors in reporting under Section 15(b) of the CPSA (e.g., the obviousness of risk, the adequacy of warnings and instructions, consumer “misuse,” and the foreseeability of such misuse) from the CPSC and place it on businesses. In addition, we are concerned about reliance on factors such as the number of defective products remaining in use as well as compliance with product safety standards to determine whether product hazards are reportable). In summary, this proposal is likely to jeopardize the Commission’s ability to receive important product safety information that serves as a critical tool for their consumer protection function.

### **CPSC Proposal**

The CPSC’s proposal identifies three revisions to the interpretive rule for determining a reportable “defect.”<sup>5</sup>

•The first revision is intended to clarify the Commission’s definition of “defect” in 16 C.F.R. § 1115.4, by adding four additional criteria Commission staff use to evaluate whether a risk of injury is the type of risk that will render a product defective, thus possibly triggering a reporting obligation under section 15(b).” The rule currently states that in determining whether the risk of injury associated with a product is the type of risk which will render a product defective, the Commission and staff consider, as appropriate:

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<sup>3</sup> See “Statement of Enforcement Policy on Substantial Product Hazard Reports,” 49 Fed. Reg. 13820 (April 6, 1984).

<sup>4</sup> A “Substantial Product Hazard” is defined as: “(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” See 15 U.S.C § 2064(a).

<sup>5</sup>See 71 Fed. Reg. 30350 (May 26, 2006).

The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experiences and expertise, the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination. A new section would add the following factors to Section 1115.4 for determining whether a product presents a risk of injury that may render it defective:

1. Obviousness of the risk;
2. The adequacy of warnings and instructions to mitigate the risk;
3. The role of consumer misuse of the product; and
4. The foreseeability of such misuse.

•The proposal adds Section 1115.12(g)(1)(ii) entitled "Number of Defective Products Distributed in Commerce", which will allow the Commission to consider that the risk of injury from a product may decline over time as the number of products being used by consumers decreases.

•The proposal adds Section 1115.8 "Compliance with Product Safety Standards." This proposal will allow the Commission to consider whether a product complies with voluntary consumer product safety standards as a factor to determine whether corrective action is required under the CPSA and other federal statutes.

## **Discussion**

### **The Failure of Regulated Industry to Report**

There has been a long history non-compliance by companies who fail to report unreasonably dangerous products as required by Section 15(b) reporting requirements. The CPSC has often levied civil penalties against these companies for failing to comply with these reporting rules. Adding additional factors to consider is sure to add ambiguity. Some examples are highlighted below:

- In 1991, Graco, a children's products manufacturer, paid a \$100,000 civil penalty for failing to report stroller injuries to CPSC in a timely fashion. Again in 2005, Graco, which is now owned by Newell Rubbermaid, was fined for the same violation – failure to report safety issues including deaths and serious injuries associated with 16 juvenile products sold under the Graco and Century brands. From 1991 through 2002, the company engaged in "systematic violations" of the law. This time, the fine was largest civil penalty ever levied by the CPSC -- \$4 million.
- In April of 2001, Cosco/Safety 1<sup>st</sup> agreed to pay CPSC a total \$1.75 million in civil penalties for failing over a four year period to report to CPSC defects in cribs, strollers and a toy walker that caused the deaths of two babies and countless other injuries. Both companies had previously been fined for failing to report

under Section 15(b); in 1996 Cosco paid a \$725,000 civil penalty and in 1998 Safety 1<sup>st</sup> paid a \$175,000 penalty.

- In August of 2002, GE paid the CPSC a \$1 million penalty for failing to report defects in dishwashers that it first became aware of 10 years earlier.
- In March 2001, West Bend Co. paid CPSC a \$225,000 fine for failing to report fire hazards caused by a defect in its water distillers it had learned about three years earlier. Again, in May 2006, West Bend paid CPSC \$100,000 for failing to report 169 incidents of failed coffeemaker carafes.

### **Additional Factors Proposed by CPSC to be Considered by Industry are Inappropriate**

The factors CPSC is proposing to add to a manufacturer's assessment of whether its product has a defect and should be reported will likely reduce critical reporting to the Commission, and provide a "safe harbor" for companies reluctant to report possible substantial product hazards associated with the product.

#### **Consideration of Consumer "Misuse" of Products**

We believe that products should be safe if used in a manner which is reasonably foreseeable. The term "product misuse" is employed too often by industry as an excuse to deny responsibility when a product is associated with inflicting harm. Information about product hazards – even if a company believes the product has been "misused" -- must be forwarded to the Commission because reports about such hazards help to generate data to support further action by the CPSC to alert consumers, or to improve the products, – including through the development of standards to minimize the hazards involved. Allowing a company to avoid reporting an injury because it claims there has been "consumer misuse" is a terrible approach. Companies should not decide this, the Commission should. This change may very well diminish the safety of products in the marketplace by removing manufacturers' incentives to anticipate possible uses of their products. For example:

A child recently died and a number of other life-threatening injuries occurred when children ingested small, powerful magnets from Rose Art's Magnetix construction sets (see CPSC press release #06-127, "Child's Death Prompts Replacement Program of Magnetic Building Sets.") Rose Art continues to claim that the injuries are caused by consumer misuse: parents are not supervising their children, which is leading to children younger than 3 having access to these toys, ingesting the magnets, and becoming gravely ill or dying. Under the proposed rules, Rose Art, by employing the proposed "consumer misuse" factor, could decide that its products do not contain a defect, and that the company is excused from the requirement to report these incidents. The unfortunate result would be that: (i) there would be no triggering of an investigation by the CPSC; (ii) no gathering of data regarding this hazard to children; and (iii) a delay of warnings to the public; and/or (iv) no product recall (even if not by the manufacturer, by retailers who do not want to sell products posing such risks to small children).

### Inadequacy of Voluntary and Mandatory Standards

Consumer Groups have a longstanding concern about the reliance of CPSC on compliance with voluntary safety standards, and the potential inadequacy of these minimum standards, developed by a “consensus” among standard-setting groups dominated by industry representatives. When manufacturers are confronted with evidence that a product may present safety hazards, the undersigned Consumer Groups believe the Commission should urge manufacturers to evaluate potentially hazardous products on a case-by-case basis, based upon the latest advances in product safety, including a safety assessment under foreseeable use conditions. We oppose this proposal to encourage regulated industry to base reporting requirements simply on compliance with voluntary standards.

We are concerned about how a company may use compliance with a voluntary safety standard to shield themselves from the obligation to report information to CPSC. In addition, it is likely that a product could comply with existing standards or mandatory rules but that a defect may exist beyond the scope of the standard. Reporting illustrates important gaps and weaknesses in standards that need to be addressed. This critical function could be eliminated by these proposed new rules.

Even if a product complies with a voluntary or mandatory standard, too often mere compliance is insufficient to protect the public from safety hazards. Typically, the industry standards-setting process begins once deaths and injuries associated with the product become significant. Standards development is a protracted process requiring typically two to five years before consensus is reached and the standard is published, all while deaths and injuries may continue to mount. Once standards are published, neither the standards-setting organizations nor the CPSC have a systematic method for determining market compliance with the standard or the effectiveness of the standard at reducing injuries.

This proposal may also weaken the incentive for manufacturers to support the development of strong safety standard since they may want to write standards that are narrow in scope so that it will “occupy the field” while creating as weak a substantive standard as possible.

#### Example:

As one of example of how reliance on industry standards is a misplaced practice of ensuring product safety, the March 2006 issue of *Consumer Reports* features an article on furniture tipover, a problem that results in 8,000 to 10,000 serious injuries and an average of 9 deaths each year, mostly to young children. Although ASTM-International publishes a safety standard to prevent furniture tipover injuries, many of the products CU has tested do not comply. Some products that do comply were inherently unsafe – some dressers could dangerously tip over simply by opening all of their empty drawers. In fact, since the CPSC requested that ASTM develop an industry safety standard, the numbers of annual fatalities associated with falling furniture have actually increased by 50 percent. In today’s

highly competitive marketplace, there is often little incentive for manufacturers to work toward developing or complying with strong voluntary safety standards.

#### Consideration of Age and/or Prevalence of Product in Market

The CPSA Substantial Product Hazard Reporting regulations make clear that:

“since the extent of public exposure and/or the likelihood or seriousness of injury are ordinarily not known at the time a defect first manifests itself, subject firms are urged to report if in doubt as to whether a defect could present a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect within the meaning of section 15 of the CPSA does, in fact, exist and whether that defect presents a substantial product hazard. 16 C.F.R. § 1115.4(e).

Length of time a product is on the market should not be used by manufacturers or the CPSC as a proxy for a decrease its presence in the marketplace. The CPSC therefore should not authorize manufacturers to determine the risk to the public based upon the amount of time a product has been on the market. This ignores the gravity of potential harm – where the risk associated with an individual product may greatly increase for any (even if only a few) products that remain in the hands of consumers over time. As some products age, they develop defects from wear and tear as well as exposure to the elements. Under this proposal, there will be no incentive for manufacturers to design out end-of-life problems. This proposal could also have the effect of creating an incentive for a company to wait to report incidents and to hide the problem until a product is “older.” In addition, we question how the CPSC will create a threshold for the number of products remaining in use before the requirement expires. Whose data will be used and how can the CPSC determine the actual number of products still in use? This adds such ambiguity to the reporting requirement that it makes it nearly impossible to determine compliance. For example, many of the 16 products Graco failed to report for which they were subsequently penalized, have a useful life of well over 10 years. These juvenile products sometimes get passed from one generation to the next. At what point does a manufacturer, as well as the CPSC, disavow responsibility for the product?

#### Warning Labels and Instructions

We strongly object to reliance on the adequacy of warning labels and instructions as factors to determine whether a product presents a substantial hazard. Warning labels often are completely inadequate to warn consumers about and to protect them from safety hazards. Labels and instructions cannot be read by young children, and risks often are ignored, go unnoticed by, or are not fully understood by caregivers and other adults. Moreover, warnings in instruction manuals are not likely to be passed on to subsequent users of products. We are concerned about how the CPSC can give guidance to manufacturers about the adequacy of warnings without first understanding their measured effectiveness. Finally, we urge the CPSC to work with companies to identify possible unreasonable risks, and to determine how best to ensure that hazards are designed out of products.

Example:

The warning labels placed on virtually all lawn mowers to avoid contact with a rotating blade were ineffective at preventing blade contact injuries. Not until the CPSC mandated the use of a "deadman control" on all mowers was there reduction in number of injuries.

### **Conclusion**

We have grave concerns that these proposed changes to the interpretive rule for Section 15(b) reporting requirements will have a deleterious effect on product safety. These proposed interpretations, if adopted by the Commission, would shift responsibility for—and possibly awareness of -- substantial product safety hazards away from the Commission to manufacturers, distributors, and retailers, who have an incentive to downplay the hazard. Rather than clarifying the responsibilities of manufacturers, the proposed new rules will make the system even more ambiguous and give safe haven to those companies seeking to downplay current or emerging safety hazards. The current reporting system under 15(b) – while far from perfect and already suffering from underreporting of safety hazards – will only worsen under the proposed new rules.

These proposed changes will, we fear, result in fewer and delayed reports and will shield the public from critical information they need to protect their families from substantial product safety hazards that otherwise that could result in injury and even death. We strongly encourage the Commissioners to reject the proposed revisions to 16 C.F.R. Part 1115.

Respectfully submitted,

Janell Mayo Duncan  
Senior Counsel for  
Legal and Regulatory Affairs  
Consumers Union

Donald Mays  
Senior Director, Product Safety &  
Consumer Sciences  
Consumers Union

Rachel Weintraub  
Director of Product Safety and Senior Counsel  
Consumer Federation of America

Nancy Cowles  
Executive Director  
Kids in Danger

Edmund Mierzwinski  
U.S. Public Interest Research Group  
Consumer Program Director



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2006 JUL -7 P 3:02

**June 18, 2006**

**Comments from Whirlpool Corporation Regarding Substantial Product Hazards Reports and Proposed Revision to Interpretative Rule.**

Re: Federal Register/Vol. 71.No. 102/Friday, May 26, 2006 Proposed Rules- 16 CFR1115- Substantial Product Hazard Reports.

Whirlpool Corporation takes this opportunity to comment on the proposed revisions to the Interpretative Rule relating to substantial product hazards under Section 15 (b) of the Consumer Product Safety Act.

Whirlpool manufactures and markets major appliances, portable appliances and home care and space management appliances. Whirlpool is the world's leading manufacturer and marketer of major home appliances, with annual sales of more than \$19 billion, more than 80,000 employees and more than 60 manufacturing and technology research centers around the world. Whirlpool brands include Whirlpool, Maytag, Kitchen Aid, Jenn-Air, Amana, Roper, Brastemp, Bauknecht and other major brand names to consumers in nearly every country around the world.

Whirlpool has interacted with the CPSC over many years with the common goal of reducing risks to consumers. Whirlpool Corporation values our relationship and has provided transparency to the CPSC by sharing our processes, standards, training, as well as discussing with the CPSC our respective points of view and learning from the CPSC during our interactions. We believe that the principles proposed for revision are helpful to further our understanding and the clarity of CPSC processes.

The Commission has provided such clarity and transparency in the key areas where the CPSC and Whirlpool Corporation have interacted. With regard to this notice, Whirlpool believes that the Commission should identify all considerations that have been employed in evaluating our obligations under Section 15. Therefore we support these revisions.

We support the addition of the following factors to the Section 15 guidelines that will help clarify the definition of a defect under Section 1115.4.

- The obviousness of risk;
- The adequacy of warnings and instructions that mitigate such risks;
- The role of consumer misuse of the product; and
- The foresee ability of such risk.

We fully recognize that these are some of the relevant considerations and we will continue to place the safety of the consumer first on our list of considerations.

The obviousness of the risk is reasonable consideration in whether a product issue is reportable as a substantial product hazard. The addition of this factor also shows that non-obvious or subtle risk must be considered and weighed toward a determination of a substantial product hazard.

Warnings and Instructions can mitigate risks that cannot be safeguarded or designed out, where consumer actions affect the safety of the product. In both common law and in CPSC practice, the magnitude of certain hazards considers the adequacy of warnings and instructions. The lack of adequate Warnings and Instructions indicates a stronger need for a submission to the Commission and possible corrective action. There are products that require a certain amount of maintenance, proper installation, operation and attention by the consumer and, if reasonable, clear instructions can mitigate the risk.

The role and foreseeable of consumer misuse is often considered in compliance decisions. It is reasonable and cognizable under the law for manufacturers and the Commission to consider to what extent hazards are created by unforeseeable and unreasonable consumer use. It is reasonable to expect that consumers of appreciable age can be expected to appropriately use and handle a product in accordance with the instructions, and act in a reckless or negligent manner. On the other hand, manufacturers recognize that not all consumers will always follow with instructions or act appropriately and when reasonably feasible margins on safety are incorporated into both safety standards and products. Therefore, there are bounds of reasonably foreseeable consumer misuse for which companies must design.

With respect to Section 1115.12(g)(1)(ii), the Commission proposes clarifying the impact of the in evaluating the risk of injury as products populations in use decline over time. At the same time, the notice recognizes that there may be other factors about a particular product that also influence the injury risk. This in the assessment of report ability, it is reasonable for a manufacturer to consider the age of the product. This is in line with reality and reasonable as consumers know that no product will operate indefinitely. We recognize that there could still be a need for public warning about older products. The serious nature of a product risk can, override the declining number of products in the field, however, declining number of products in use, is a relevant consideration when risk is evaluated.

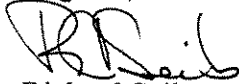
The Commission is well advised to explain the relationship of safety standards and Section 15. Clearly, the failure to meet any mandatory standards which apply are the basis for corrective action and compliance with such standards are relevant to Section 15 determinations. In the case of AHAM products there is, with very limited exception, no

mandatory standards that apply. Whirlpool requires that all products meet the relevant safety standard and be all products meet the relevant safety standard and be listed by an acceptable certification agency.

We support the proposed changes. Whirlpool believes that the public is better protected by these efforts to clarify the obligations of manufacturers with respect to the Interpretative Rule relating to substantial product hazards under section 15(b), if those who place products in the marketplace better understand the factors of the Commission evaluates what they must consider. We commend the Commission for this initiative and urge that it be finalized as soon as possible.

We can provide further information if requested.

Regards,



Richard Seib  
Whirlpool Corporation  
Director Global Product Safety  
269-923-3289

cc: M. Thieneman  
cc: T. Catania